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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 659/2015*, **

Communication submitted by:	R.R.L. (represented by counsel, Rachel Benaroch)
Alleged victims:	The complainant, his wife, D.R.L., children, I.S.L., I.P.L., L.V.L. and L.D.L., and a daughter-in-law, P.S.A.
State party:	Canada
Date of complaint:	2 February 2015 (initial submission)
Date of present decision:	10 August 2017
Subject matter:	Deportation to Sri Lanka
Substantive issue:	Non-refoulement
Procedural issues:	Non-exhaustion; non-substantiation of claims
Article of the Convention:	3

1.1 The complainant is R.R.L., a Sri Lankan national of Tamil ethnicity, born in 1966. He submits a complaint in his own name, as well as on behalf of his wife, D.R.L. (born in 1969), their four children, I.S.L. (born in 1991), I.P.L. (born in 1995), L.V.L. (born in 1995) and L.D.L. (born in 2000), and a daughter-in-law, P.S.A. (born in 1992). They were all born in the Eastern Province, Sri Lanka, and are Christians.[†] At the time of submission of the complaint, they were awaiting deportation to Sri Lanka, following the rejection of their asylum application by the Canadian authorities. The complainant claims that his and his family's deportation to Sri Lanka would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel, Rachel Benaroch.

1.2 On 16 February 2015, pursuant to rule 114, paragraph 1, of its rules of procedure (CAT/C/3/Rev.6), the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to deport the complainant and his family to Sri Lanka, while the complaint was being considered by the Committee. On 29 October 2015, the Committee, acting through the same Rapporteur, denied the State party's requests of 12 June 2015 and 14 August 2015 to lift interim measures.

* Adopted by the Committee at its sixty-first session (24 July–11 August 2017).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Race, Sébastien Touzé and Kening Zhang.

† The complainant's daughter-in-law, originally a Muslim, converted to Christianity on 1 August 2012, the day she married the complainant's son, I.S.L.

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Factual background

2.1 On 5 May 1995, while visiting relatives in Trincomalee, the complainant and two of his siblings were arrested by the Sri Lanka Army and taken to a detention camp in Trincomalee. The complainant was severely assaulted in the camp and taken to Trincomalee Hospital for treatment. The complainant alleges that one of the officers, T.S., who arrested him and personally assaulted him while in detention, was an Intelligence Officer in Trincomalee and is currently employed as a local security assistant for the United Nations Department of Safety and Security in Jaffna. While detained in the Trincomalee camp, the complainant received eight visits from officers from the International Committee of the Red Cross (ICRC). He was released on 10 February 1996 without any charges. The complainant was never informed of the reasons for his detention.

2.2 In July 2006, the complainant started working with United Nations Department of Safety and Security as a local security assistant in the Eastern Province, covering the districts of Ampara, Batticaloa and Trincomalee. He was in charge of sending reports to his supervisor on the security situation in the Eastern Province and providing technical support to the area security coordinator and all United Nations staff in that province. As part of his responsibilities, the complainant regularly interacted with the Sri Lanka Army, police, Special Task Force and other government officials, paramilitary groups and the Liberation Tigers of Tamil Eelam (LTTE).

2.3 Certain aspects of the complainant's professional responsibilities created resentment among government and paramilitary groups, especially the Tamil Makkal Viduthalai Pulikal (TMVP) and LTTE,[2] who were displeased that reports were being disseminated to the United Nations on what was occurring on the ground in the Eastern Province. On 28 June 2008, the complainant received a threatening telephone call, warning that he should not interfere with "their" work, and accusing him of being an LTTE supporter. On an unspecified date, he filed a complaint with the police in Batticaloa. However, the police never identified the caller. In the meantime, the complainant continued to receive threatening phone calls on a monthly basis, with the caller referring to reports about the security situation written by the complainant and saying, "We know you are an ex-LTTE cadre, we know who you are, be careful, we will kill you".

2.4 In August 2009, an armed member of TMVP, surrounded by a group of four or five men, showed up at the complainant's house and threatened him with death.[3] The complainant contacted the police, who dispersed the group of men. Before the group left, the armed man told the complainant, "We will see you later". The complainant adds that, back then, TMVP was abducting children to be used as soldiers. He believes that the source of resentment against him was the fact that he acted as an interpreter between the United Nations Children's Fund (UNICEF) and TMVP in the camps where some children were being held.

2.5 At approximately 2 a.m. on 22 August 2011, unknown assailants threw projectiles at the complainant's house for approximately twenty minutes. The incident was reported in the United Nations weekly report of 26 August 2011.

2.6 In November 2011, the complainant was assigned by the United Nations to a duty station in Trincomalee. As part of his professional responsibilities, he had to interact with T.S., the intelligence officer who had arrested him in 1995. The officer asked the complainant his name and if he had ever been in Trincomalee before and whether they knew each other. The complainant responded in the affirmative. The following day, the officer was reassigned to a duty station in Jaffna.

2.7 In January 2012, the complainant noticed that he was often followed by men on motorbikes without licence plates whenever he left his house. The riders wore black helmets with opaque visors that completely hid their faces. The complainant filed about

[2] The complainant states that he informed his United Nations supervisor on several occasions of the threats. On the advice of his supervisor, he filed numerous complaints with the police, but the police did not conduct any official investigation.

[3] The armed member of TMVP allegedly told the complainant: "You think you are a big person? You are a Tamil person and you are working against us. If you want I can kill you".

twenty verbal complaints with the police regarding those incidents. However, nothing was ever done. For about eight months, the complainant's family members were also followed by men on motorbikes. The family became frightened and the children stopped going to school.

2.8 In June 2012, the complainant resigned from his job with United Nations Department of Safety and Security because he considered that it put his life and that of his family in danger.

2.9 In July 2012, the complainant's son, L.S.L., was out on his motorbike, when he was approached by a man wearing a black helmet with an opaque visor, who asked him where his father was and whether he had left the country. On 24 August 2012, the complainant was walking with one of his daughters, L.V.L., when a man on a motorbike attempted to grab his daughter's arm. When she started screaming, the man drove away.

2.10 On 28 August 2012, the complainant found the headlights of his car smashed. A bystander told him that four men, wearing black helmets with opaque visors, had come by on two motorbikes, smashed the headlights and driven away. On 30 August 2012, the complainant found the mirrors of his car broken. He adds that cars began parking near his house for long periods, especially at night, in a place that gave good visibility of the house. Once the lights in the house went on, the cars would immediately drive away.

2.11 On 9 September 2012, the complainant's family left their home and stayed in Colombo before taking a flight to the United States on 12 September 2012. On 22 September 2012, the complainant and his family travelled by bus from Buffalo, New York, to Plattsburgh, New York, and thereafter by taxi to the Canadian border in the vicinity of Lacolle, Quebec. On 23 September 2012, they crossed illegally into Canada by an unguarded road but were detained shortly thereafter by immigration authorities, at which time they filed claims for refugee protection.

2.12 On 16 April 2014, the complainant and his family had a single joint hearing in Montreal. On 13 May 2014, the Immigration and Refugee Board rejected their claims on the basis of lack of credibility and determined that the claimants were not "Convention refugees"[4] and "persons in need of protection".[5] They were notified of the decision on 20 May 2014.

2.13 On 11 June 2014, the complainant and his family applied to the Federal Court of Canada for leave and judicial review of the Immigration and Refugee Board's decision. On 17 September 2014, the Federal Court denied the application.

2.14 On 20 January 2015, the complainant and his family[6] applied to Canada Border Services Agency for an administrative stay of the removal orders, pursuant to section 50 of the Immigration and Refugee Protection Act. On 28 January 2015, an Inland Enforcement Officer of the Agency communicated the negative decision to the legal representative of the complainant and his family, explaining that he was not satisfied that the family's circumstances warranted a deferral of removal.

2.15 The complainant and his family had to wait 12 months as of the date of the rejection of their asylum application before being able to file an application for a pre-removal risk assessment or for permanent residence on humanitarian and compassionate grounds.[7] However, their removal to Sri Lanka was scheduled to take place prior to the expiry of the 12-month bar.

[4] See 1951 Convention relating to the Status of Refugees.

[5] Reference is made to section 97 of the Immigration and Refugee Protection Act and section 7 of the Canadian Charter of Rights and Freedoms.

[6] The application was submitted on behalf of the complainant, his wife and their three daughters.

[7] Section 112 (2) (b.1) of the Immigration and Refugee Protection Act provides that, in general, a person may not apply for protection through the pre-removal risk assessment process if, "less than 12 months have passed since their claim for refugee protection was rejected ... or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division". The same 12-month bar applies to application for permanent residence on humanitarian and compassionate grounds.

2.16 On 9 January 2015, the complainant and his family[8] applied for permanent residence on humanitarian and compassionate grounds in the best interests of their minor children and requested to be exempted from the 12-month bar. However, such application does not stop a deportation.[9] The complainant and his family submit that they have exhausted all available domestic remedies.

The complaint

3.1 The complainant claims that his and his family's return to Sri Lanka would place them at a serious risk of torture for the following reasons: (1) they are Tamils from the Eastern Province; (2) he was suspected of links to LTTE and was detained and tortured in 1995; (3) he worked as a United Nations local security assistant for six years and owing to his professional responsibilities, he had conflicts with government authorities and paramilitary groups; and (4) he and his family had lived for two and a half years in Canada, where there is a large Sri Lankan diaspora supporting LTTE. He stated that they would therefore be suspected of having had contacts with LTTE in the diaspora.

3.2 The complainant further claims that, as failed asylum seekers in Canada, he and his family might be suspected of having links to LTTE or having engaged in anti-Government activity. He cites reports which indicate that "rejected asylum seekers and returnees appear to be at risk of torture, if accused of anti-Government political activity or links to the LTTE".[10] The complainant argues that, making a refugee claim, especially when one has extensive knowledge of the security situation in Sri Lanka, as he does, is tantamount to anti-Government activity. The complainant submits that, owing to the above circumstances, he fears that the Sri Lankan authorities, including the paramilitary group, TMVP, will torture him and his family members. Therefore, by deporting them to Sri Lanka, the State party will violate article 3 of the Convention.

State party's observations on admissibility and merits

4.1 On 12 June 2015 and 14 August 2015, the State party submits that the present complaint contains the same factual allegations as those put before the Canadian authorities. It submits that the complaint is inadmissible. Firstly, the complainant and his family have not exhausted all available domestic remedies, as their applications for permanent residence on humanitarian and compassionate grounds and for pre-removal risk assessments are pending. Both of these processes are effective remedies, since a favourable decision on either one would enable the complainant and his family to remain in Canada. They would also be entitled to apply to the Federal Court to seek judicial review, should they receive negative decisions on those applications. A successful judicial review would result in an order for reconsideration of the impugned decision. A judicial stay of removal pending the disposition of any Federal Court application may also be available.

4.2 Secondly, the State party submits that the complainant and his family's allegations are not substantiated, on even a prima facie basis, rendering the complaint inadmissible as manifestly unfounded under rule 113 (b) of the Committee's rules of procedure. The complainant has not established that the family's status as failed refugee claimants would put them at risk of torture upon return to Sri Lanka. The State party submits that failed asylum seekers are only at risk of persecution upon return if they are perceived by Sri

[8] The application was submitted on behalf of the complainant, his wife and their minor daughter.

[9] Reference is made to the information posted on the website of Immigration, Refugees and Citizenship Canada.

[10] Reference is made to the report of the Office of the United Nations High Commissioner for Refugees (UNHCR) on failed refugee claimants returned to Sri Lanka, dated 3 February 2014, which complements an earlier report, dated December 2012, on the same issue. Amnesty International and Human Rights Watch have called upon Australia to stop the deportation of Sri Lankan refugees owing to a real risk of detention and torture. Freedom from Torture indicates that a connection at any level with LTTE puts a failed refugee claimant at risk of torture. A recent decision of the United States of America Federal Court of Appeals ruled that asylum seekers returned to Sri Lanka are subjected to torture on return. A report of the Human Rights Law Centre, dated September 2014, documents the serious risk of torture that failed asylum seekers suspected of links to LTTE can encounter when returned to Sri Lanka.

Lankan authorities as having been involved in anti-Government activity or in pro-LTTE activities. The complainant and his family have presented no evidence that they were engaged in such activities or that they may be perceived as having done so. Moreover, the complainant has not established that his history of employment with United Nations Department of Safety and Security puts him at risk of torture or persecution. Objective reports on the human rights situation in Sri Lanka do not support the complainant's position that United Nations employees face a risk of harm at the hands of Sri Lankan authorities. Although some human rights reports suggest that activists and humanitarian workers face a greater risk of persecution than the general population, United Nations employees do not fall within this risk profile.

4.3 The complainant's narrative reveals that Sri Lankan authorities have shown willingness and the ability to protect his family from harm. The complainant recounts that in 2009, when TMVP members harassed him in front of his house, the authorities responded to his call and were successful in dispersing the TMVP members. In addition, he annexed to his complaint numerous police reports. The existence of those reports demonstrates that the police in Batticaloa took the complainant's allegations of threats and harassment seriously.

4.4 In the alternative, the State party submits that, even if the complainant and his family's claims amount to persecution or torture, he has not discharged the burden of showing that the risk is ongoing. In the State party's view, the incidents that occurred between 2008 and 2012 do not provide a credible basis upon which the Committee could conclude that the complainant and his family would continue to face a risk of torture if returned to Sri Lanka today. The complainant has submitted some evidence that postdates the family's departure from Sri Lanka. The complainant alleges that his daughter and son-in-law, who have remained in Sri Lanka, have been receiving threatening phone calls, in which the caller demands that the complainant return to Sri Lanka. He also alleges that an intruder entered their yard in September 2014. Finally, the author's son-in-law was involved in a road accident, which he claims was caused intentionally by two men on motorcycles. According to a medical report, he suffered a back injury. The State party submits that, even if taken at face value, those incidents are not sufficient to demonstrate an ongoing risk to the complainant and his family. On the contrary, the complainant's submissions make it clear that his daughter and son-in-law have remained in Batticaloa in relative safety for over two years. The above-mentioned incidents demonstrate that, at most, the complainant and his family might continue to be subjected to harassment if returned to Sri Lanka. The State party also submits that the complainant has not alleged that his presumed detention without charge for 10 months in 1995 and 1996 was related to the family's ongoing fear of persecution. In fact, he states that the man who was responsible for his detention also became an employee of the United Nations.

4.5 In support of its argument that the complaint should be declared inadmissible under rule 113 (b) as manifestly unfounded, the State party also submits that it would be inappropriate for the Committee to re-evaluate the conclusions reached by domestic decision makers with respect to the complainant's claim for protection for himself and his family. It submits that it is not the role of the Committee to weigh evidence or reassess findings of fact made by domestic courts, tribunals or decision makers.

4.6 In the event that aspects of the complaint are considered admissible, the State party submits, in the alternative, that it is entirely without merit. In that context, it acknowledges that, generally speaking, serious human rights violations continue in Sri Lanka.[11] However, despite the human rights issues affecting Tamils generally, not all Tamils face a risk of torture. Indeed, objective reports, including the ones provided by the complainant, confirm that only individuals bearing certain personal characteristics are subject to such a risk. Some failed refugee claimants may bear these personal characteristics, but the complainant and his family do not. The State party also acknowledges reports that some failed refugee

[11] Reference is made to, inter alia, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 21 December 2012, p. 5; and United States of America, Department of State, *2013 Country Reports on Human Rights Practices — Sri Lanka*, 27 February 2014, p. 2.

claimants had been detained or tortured upon return to Sri Lanka.[12] Most reports, however, make it clear that returnees were detained because they were accused of links to LTTE, activists or opposition parties. There appears to be a consensus among credible human rights organizations that, in the absence of this perceived link, failed refugee claimants who are returned to Sri Lanka do not face a risk of harm that is sufficient to require international protection. The State party submits, therefore, that even if Sri Lankan authorities should identify the complainant and his family as failed asylum seekers of Tamil descent, it will not lead the authorities to subject them to torture. The complainant and his family have not provided any reason to believe that Sri Lankan authorities will consider them to be LTTE supporters. There is also no indication that any of the family members are the subject of outstanding court orders or arrest warrants, or are otherwise on a "stop" or "watch" list.

4.7 As to the complainant's claim that his former role with the United Nations puts him at risk of torture, the State party reiterates its argument that United Nations employees are not subject to a particular risk of torture or harm at the hands of the Sri Lankan authorities. Furthermore, the complainant's suggestion that the Government of Sri Lanka may impute a connection between him and LTTE based on his role with the United Nations is unsubstantiated. The complainant has not provided any evidence to suggest that the Government may perceive him as being an LTTE supporter or an anti-Government activist. The United Nations is not in conflict with the Government, nor is it aligned with LTTE, and employment with the United Nations cannot be perceived as anti-Government activity. As to the complainant's argument that filing a claim for refugee protection when one has extensive knowledge of the security situation in Sri Lanka is tantamount to anti-Government activity, the State party submits that such position is unsubstantiated, since the complainant has not demonstrated that United Nations employees face a greater risk of harm than failed refugee claimants generally. The State party submits, therefore, that there are no substantial grounds to believe that returning the complainant and his family to Sri Lanka would expose them to a risk of being subjected to torture in violation of the State party's obligations under the Convention.

4.8 The Immigration and Refugee Board of Canada found that many of the complainant's statements concerning the threats against his family were not credible. It highlighted inconsistencies in the complainant's oral testimony, his interview with an officer of Canada Border Services Agency, his Personal Information Form and other documentary evidence submitted to the Board. In particular, the Board highlighted the complainant's failure to mention, in some interviews, alleged incidents of harassment that he raised in others. The complainant also gave inconsistent responses to the question of whether he had ever been tortured. The Board also noted that aspects of the complainant's evidence were implausible. For instance, the Board questioned why some incidents had been reported to the local police, while others had not. In concluding that the complainant's version of events lacked credibility, the Board also considered the evolving political situation in Sri Lanka. It noted that, according to its National Documentation Package on Sri Lanka, the group TMVP that allegedly threatened the author outside his house in 2009 had surrendered its weapons that same year and ceased to operate as a paramilitary group. As a result, the Board concluded that the threats received by the complainant and his family in 2009 did not demonstrate the existence of an ongoing risk.

4.9 The State party adds that the complainant and his family were represented by legal counsel at the Board's hearing and were given the opportunity to adduce evidence and make submissions. The complainant provided testimony to substantiate the risk the family allegedly faces. That testimony was thoroughly assessed in the Board's decision.

4.10 The complainant and his family subsequently applied to the Federal Court for leave to seek judicial review of the Immigration and Refugee Board's decision. The Federal Court denied the application on 17 September 2014. In compliance with its practice regarding applications for leave, the court did not provide reasons.

4.11 In January 2015, the complainant and his family applied for an administrative deferral of their removal. On 28 January 2015, an Inland Enforcement Officer of Canada

[12] See *UNHCR Eligibility Guidelines*, p. 8.

Border Services Agency communicated his negative decision and reasons for it to the legal representative of the complainant and his family. In that regard, he summarized the evidence of risk put forth by the complainant and highlighted the various inconsistencies in the submission. The two risk factors raised in the present complaint, namely the family's status as failed asylum seekers and the complainant's past employment with the United Nations, were clearly before the officer and considered in the decision. Ultimately, the officer was not satisfied that there was a personal risk of death or inhumane or excessive treatment or punishment that would warrant a deferral of removal. The complainant and his family did not apply for leave to seek judicial review of that decision.

4.12 On 9 January 2015, the complainant and his family filed an application for permanent residence on humanitarian and compassionate grounds. At the time of filing the State party's observations, that application was still pending. In the assessment of an application for permanent residence on humanitarian and compassionate grounds, the decision maker considers the best interest of any child under 18 years of age who will be directly affected by the decision, taking into account the age of the child, the degree of his or her establishment in Canada, medical issues or other special needs of the child, among other factors.

4.13 The State party submits that an application for permanent residence on humanitarian and compassionate grounds is an effective domestic remedy available to anyone whose claim for protection has been denied.[13] The State party regrets that, in its recent decisions,[14] the Committee has considered that applications for permanent residence on humanitarian and compassionate grounds are not remedies that must be exhausted for the purposes of admissibility. In the view of the Canadian authorities, it should not matter on which grounds a complainant is allowed to remain in Canada, when the result — protection from removal to the country where he or she alleges to be at risk — is the same.

4.14 Since filing their complaint with the Committee, the complainant and his family became eligible for a pre-removal risk assessment, for which they applied on 28 May 2015. They are now subject to a legislative stay of removal, pending the determination of the assessment.

4.15 The State party also notes that, in recent jurisprudence,[15] the Committee referred to section 18.1 (4) of the Federal Courts Act, which sets out the grounds for judicial review, and observed that none of the grounds includes a "review on the merits" of the complainant's claim that he or she would be tortured if returned to his or her country of origin. On that basis, the Committee accepted the complainants' arguments that judicial review of negative decisions of the Immigration and Refugee Board or those of a pre-removal risk assessment did not provide them with an effective remedy in the circumstances of their cases. The Committee also expressed the view that the State party should provide for "judicial review on the merits" of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture.[16]

4.16 The State party does not accept as a general proposition that its domestic system of judicial review, and in particular its Federal Court, does not provide an effective remedy against removal where there are substantial grounds for believing that a complainant faces a risk of torture. It considers that the Committee has misapprehended the nature of judicial review by the Federal Court, given that Canada's current system of judicial review does provide for judicial review on the merits.

[13] Reference is made to communication No. 66/1997, *P.S.S. v. Canada*, decision adopted on 13 November 1998, para. 6.2.

[14] Reference is made to communications No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010, paras. 6.3-6.4; and No. 343/2008, *Kalonzo v. Canada*, decision adopted on 18 May 2012, para. 8.3.

[15] Reference is made to communications No. 319/2007, *Singh v. Canada*, decision adopted on 30 May 2011, para. 8.8; and No. 520/2012, *W.G.D. v. Canada*, decision adopted on 26 November 2014, para. 7.3.

[16] See *Singh v. Canada*, para. 8.9.

Complainant's comments on the State party's observations

5.1 In his submissions of 19 August 2015 and 17 December 2015, the complainant reiterates his initial claims. As to the State party's argument that the complainant does not make any connection between his detention in 1995 and the family's fear of persecution, the complainant submits that the aforementioned detention, under section 19 (2) of the Emergency Regulaions dealing with terrorist activities is one factor among many others for his fear of torture in his country of origin. He refers to a recent report issued by Organisation Suisse d'Aide aux Réfugiés,[17] according to which, the Sri Lankan authorities keep records of arrests going back many years.

5.2 The complainant recalls that he and his family were harassed over several years. In that connection, he submits that torture can consist not only of physical, but also mental harm, and that many measures that may not be torture in themselves can amount to torture cumulatively.

5.3 With regard to the State party's argument that, as a former United Nations employee, he is not subject to a particular risk of torture or harm at the hands of the Sri Lankan authorities and that "employment with the United Nations simply cannot be perceived as anti-Government activity", the complainant submits that the State party failed to consider his particular duties with the United Nations. He adds that, according to a recognized principle of refugee law, what does or does not constitute anti-Government activity depends on the point of view of the asylum seeker's country of origin and not that of the asylum country. Reporting on the security situation in Sri Lanka can be very detrimental to one or both parties to the conflict, especially since both committed war crimes and crimes against humanity. Furthermore, in addition to reporting on the security situation, the complainant was also a liaison officer between the Sri Lankan forces, including the paramilitary groups, and LTTE. While carrying out his duties, the complainant had encountered many problems with the Sri Lankan forces and paramilitary groups. His last service evaluation from the United Nations mentions that he and his family had been threatened. The complainant further submits that, as a United Nations employee he was also a humanitarian worker, since he dealt with various United Nations organizations, including UNICEF, Office of the United Nations High Commissioner for Refugees and the World Food Programme. Contrary to the State party's claims, his individual circumstances put him at serious risk of persecution, since his activities as a United Nations employee and humanitarian worker were considered anti-Government activities.

5.4 A number of recent reports on the general human rights situation in Sri Lanka and on the risk faced by failed asylum seekers[18] indicate that any link to LTTE, at any level or even one that existed a long time ago, can put a failed asylum seeker at risk of torture. In the present case, there exists a link to LTTE because of the complainant's detention in 1995, his work for the United Nations, the family's failed asylum claim in Canada — the country with the largest Tamil diaspora — and the family's long absence from Sri Lanka.

5.5 The complainant submits that the fact that his daughter and son-in-law, who have remained in Sri Lanka, were not killed — although someone attempted to do so (see paragraph 4.4) — does not mean that he and his family will not face any risk of serious harm upon their return. To hold otherwise would mean that, unless all his family members in Sri Lanka are killed, there cannot be a serious risk for him and other members of his family.

5.6 The complainant recalls that all effective remedies with suspensive effect had been exhausted at the time of submission of the present complaint to the Committee and that he

[17] See Organisation Suisse d'Aide aux Réfugiés, "Sri Lanka: dangers liés au renvoi des personnes d'origine tamoule", 16 June 2015, p. 14.

[18] Reference is made to Immigration and Refugee Board of Canada, "Responses to Information Requests", LKA105041.E, 11 February 2015, on the treatment of suspected members or supporters of LTTE; Organisation Suisse d'Aide aux Réfugiés, "Sri Lanka: dangers liés au renvoi des personnes d'origine tamoule", 16 June 2015, pp. 12 and 19; and Blue Mountains Refugee Support Group, "Sri Lanka, Australia and asylum seekers 2013-2014: Country guidance update for refugee supporters", October 2014.

and his family have not been removed to Sri Lanka owing only to the Committee's request for interim measures. Furthermore, on 30 October 2015, a negative decision was rendered in relation to his application for permanent residence on humanitarian and compassionate grounds by a representative of the Minister of Citizenship and Immigration Canada. The reasons for that decision were sent to the complainant upon request on 9 December 2015. The deciding officer mentioned that he or she was also the officer in charge of the pre-removal risk assessment application submitted by the complainant and his family. Although the criteria for granting permanent residence on humanitarian and compassionate grounds are different from those for the pre-removal risk assessment, it is almost always the same decision that is rendered by the deciding officer for both applications. Although the complainant has not received the pre-removal risk assessment decision as yet, he fears that it will be negative for the same reasons as the application for permanent residence on humanitarian and compassionate grounds.

Complainant's additional comments

6.1 On 28 November 2016, the complainant informed the Committee that, on 30 October 2015, his application for a pre-removal risk assessment was rejected as it was determined that he and his family "would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Sri Lanka".[19]

6.2 The complainant explained that they decided not to contest the negative decisions relating to their applications for pre-removal risk assessment and permanent residence on humanitarian and compassionate grounds in the Federal Court because of the costs involved and because they felt that those procedures would be futile.[20] He and his family re-applied for permanent residence on humanitarian and compassionate grounds in August 2016. However, their application was returned in November 2016 because they had used outdated forms. The complainant and his family resubmitted an application later the same month.[21]

State party's additional observations on the complainant's comments

7.1 By note verbale of 30 January 2017, the State party submitted its observations on the complainant's comments. The State party reiterates that the communication is inadmissible because the complainant and his family failed to exhaust all available domestic remedies and that their claim that their return to Sri Lanka would be in violation of article 3 of the Convention is manifestly unfounded. In the event that the Committee should consider the communication admissible, the State party considers that it should be found without merit.

7.2 The State party submits that the pre-removal risk assessment officer provided detailed reasons in the decision of 30 October 2015 for the rejection of the application filed by the complainant on his own and on behalf of his spouse and daughter. The officer reviewed all the evidence submitted and identified documents which could constitute new evidence of risk of harm and thus be considered relevant to the assessment process. In that regard, the officer took into consideration police reports submitted by the complainant as new evidence that were not previously available to him. In his analysis, the officer outlined a contradiction between the complainant's narrative and the adduced reports, demonstrating that the complainant, the principal applicant, had previously provided reasons why he did not file a written complaint with the police in relation to the motorcycle incident when, in fact, one of the reports specifically mentions that a complaint was filed. That contradiction further undermined the complainant's credibility and the evidence was given little probative value.

7.3 The assessment officer also found that the complainant failed to submit sufficient evidence to establish a link between the alleged threats to his married daughter who is in Sri Lanka and his previous work with the United Nations. Furthermore, after considering a number of general reports on conditions in Sri Lanka, the assessment officer determined

[19] The complainant provides a copy of the pre-removal risk assessment decision dated 30 October 2015.

[20] The complainant does not provide any further information.

[21] The complainant does not provide a specific date.

that the profile of the complainant and his family as failed refugee claimants did not expose them to a risk of torture if returned to Sri Lanka.

7.4 The State party submits that the officer who considered the application for permanent residence on humanitarian and compassionate grounds also provided detailed reasons for the rejection of the application filed by the complainant on his own and on behalf of his spouse and daughter, who was 15 years old at the time. That officer was "not satisfied that the complainant and his family would suffer unusual and undeserved or disproportionate hardship should they present their permanent residence application abroad".

7.5 In coming to this conclusion, the officer considered various factors, including the best interest of the child. In that regard, the officer considered the fact that the family would be returning to Sri Lanka as a unit and the complainant did not demonstrate that his daughter would not have access to adequate education, health or social services. The officer concluded that there was not sufficient evidence to establish that the general consequences of applying for permanent residence from outside Canada would have a negative impact on the child.

7.6 The State party maintains that the complainant and his family have not exhausted all available domestic remedies as they have not applied to the Federal Court for leave for a judicial review of the decisions of 30 October 2015 rejecting their pre-removal risk assessment and permanent residence applications. The State party explains that a successful judicial review would result in an order for reconsideration of the impugned decisions.

7.7 The State party argues that the complainant and his family could have also sought leave for a judicial review of the decision of 28 January 2015 taken by the officer of Canada Border Services Agency rejecting their application for administrative deferral of their removal. The State party further informs the Committee that a judicial stay of removal pending the disposition of a Federal Court application may also be available.

7.8 The State party reiterates that judicial review is a procedure that should be exhausted for the purposes of admissibility and that the judicial review by the Federal Court provides for review on the merits and provides an effective remedy against removal.

7.9 The State party claims that the complainant's assertions that the judicial review process is both costly and futile are unsubstantiated. The State party submits that mere doubts about the effectiveness of a remedy do not absolve a person from seeking to exhaust that remedy and that it is generally not within the scope of the Committee's competence to evaluate the prospects of success of a domestic remedy.[22] Furthermore, the complainant and his family have not shown, or even alleged, that they lacked the financial means to pursue those remedies.

7.10 Finally, the State party informs the Committee that a new application for permanent residence on humanitarian and compassionate grounds was received in November 2016. The application was filed by the complainant on his own and on behalf of his spouse and daughter. The State party informs the Committee that they will be entitled to apply to the Federal Court for leave for a judicial review of a negative decision regarding an application for permanent residence.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

[22] See, for example, communications No. 22/1995, *M.A. v. Canada*, decision adopted on 3 May 1995, paras. 3-4; and No. 86/1997, *P.S. v. Canada*, decision adopted on 18 November 1999, paras. 5.1-5.3 and 6.3.

8.2 The Committee notes the State party's argument that the complaint should be declared inadmissible under article 22 (5) (b) of the Convention, as the complainant and his family have not exhausted all available domestic remedies. First, they have not applied to the Federal Court for leave to seek a judicial review of the decisions of 30 October 2015 rejecting their pre-removal risk assessment and permanent residence applications; second, they have not sought leave for a judicial review of the decision of the Canada Border Services Agency of 28 January 2015 rejecting their application for administrative deferral of their removal; and third, in November 2016, the complainant, on his own and on behalf of his wife and daughter, submitted a new application for permanent residence on humanitarian and compassionate grounds. The Committee also notes the State party's contention that the judicial review in the Federal Court provides for an effective remedy against removal.

8.3 In this context, the Committee recalls its jurisprudence according to which such judicial review deals mainly with procedural issues and does not involve a review of the merits of the case.[23] As the complainant had already submitted applications to the Immigration and Refugee Board and the Federal Court, as well as applications under the procedures for pre-removal risk assessment and permanent residence on humanitarian and compassionate grounds, the Committee considers that it would be unreasonable to require that the complainant also apply for a judicial review of the negative risk assessment decision. Regarding the new application for permanent residence, submitted in November 2016, the Committee recalls that an application for permanent residence does not constitute, in any case, an effective remedy for the purposes of admissibility, given its non-legal nature and the fact that it does not stay the removal of a complainant.[24] Accordingly, the Committee considers that it is not precluded by the requirements of article 22 (5) (b) of the Convention from considering the communication.

8.4 The Committee recalls that for a claim to be admissible under article 22 of the Convention and rule 113 (b) of its rules of procedure, it must attain the basic level of substantiation required for purposes of admissibility. The Committee notes the State party's argument that the communication is manifestly ill-founded owing to a lack of substantiation. The Committee considers, however, that the arguments put forward by the complainant raise substantive issues under article 3 of the Convention and that the merits of those arguments should be addressed. Accordingly, the Committee declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

9.1 In accordance with article 22 (4) of the Convention, the Committee has considered the communication in the light of all the information made available to it by the parties.

9.2 The issue before the Committee is whether the removal of the complainant and his family to Sri Lanka would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

[23] See communication No. 582/2014, *N.S. v. Canada*, decision adopted on 1 December 2016, para. 8.2.

[24] See, inter alia, *Kalonzo v. Canada*, para. 8.3.

9.3 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention, according to which, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable (para. 6), the Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk. Although, under the terms of its general comment No. 1, the Committee must give considerable weight to findings of fact that are made by organs of the State party concerned, it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case (para. 9).

9.4 In assessing the risk of torture in the present case, the Committee notes the complainant's contention that there is a risk that he and his family would be tortured if returned to Sri Lanka owing to the fact that, in 1995, he was allegedly detained and tortured because he was suspected of links with LTTE; he worked with United Nations Department of Safety and Security for six years and owing to his professional responsibilities he had conflicts with government authorities and paramilitary groups; since 2008, he and his family had been subjected to harassment and attacks by unknown individuals on various occasions; and he feared that he and his family would be suspected of links with LTTE in the diaspora as failed asylum seekers from Canada.

9.5 However, the Committee also notes the State party's observations that its domestic authorities found that many of the complainant's statements concerning the threats against his family lacked credibility; the complainant has not demonstrated that his history of work with United Nations Department of Safety and Security put him at risk of torture; and the complainant and his family have not presented any evidence that they were involved in anti-Government or pro-LTTE activities that would put them at risk as failed asylum seekers.

9.6 The Committee particularly notes the State party's argument that the information provided by the complainant, including police reports, does not demonstrate that the Sri Lankan authorities are not willing and do not have the ability to protect him and his family from harm. In that connection, the Committee notes that, in August 2009, when the complainant was threatened with death by an armed member of TMPV and a group of men, the police was responsive and dispersed the group of men. It also notes that, when the complainant received a threatening telephone call one year before, he filed a complaint with the police in Batticaloa, which could not, however, identify the caller.

9.7 The Committee further notes the State party's submission that the complainant and his family have not demonstrated that the alleged incidents that occurred between 2008 and 2012 represent an ongoing risk for them if returned to Sri Lanka. In that connection, the Committee considers that the complainant has not submitted sufficient evidence to establish a link between the alleged threats to his married daughter and son-in-law who are still living in Sri Lanka, in 2014, and his previous work with United Nations Department of Safety and Security or his detention, in 1995.

9.8 Regarding the complainant's general claim that he risks being subjected to torture upon return to Sri Lanka owing to his status as a Tamil with real or perceived links with the LTTE and as a failed asylum seeker returning from overseas, the Committee agrees that Sri Lankans of Tamil ethnicity with a real or perceived prior personal or familial connection to LTTE facing forcible return to Sri Lanka may face a risk of torture. In this connection, the Committee notes the current human rights situation in Sri Lanka and refers to its concluding observations on Sri Lanka's fifth periodic report, in which it expressed concern, inter alia, about reports regarding the persistence of abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including the military and the police,[25] which had continued in many parts of the country after the conflict with LTTE had ended in May 2009, and to credible reports by non-governmental organizations[26] concerning the

[25] See CAT/C/LKA/CO/5, paras. 9-12.

[26] See, for example, Freedom from Torture, *Tainted Peace: Torture in Sri Lanka since May 2009*, August 2015, available at www.freedomfromtorture.org/sites/default/files/documents/sl_report_a4_-_final-f-b-web.pdf, and Yasmin Sooka, The Bar Human Rights Committee of England and Wales

treatment of returned individuals by the Sri Lankan authorities.[27] However, the Committee recalls that the occurrence of human rights violations in one's country of origin is not sufficient in itself to conclude that an individual runs a personal risk of torture.[28] The Committee also recalls that, although past events may be of relevance, the principal question before the Committee is whether the complainant currently runs a risk of torture if returned to Sri Lanka.[29] The Committee notes that, in its assessment of the complainant's asylum application, the State party's authorities considered the possible risk of ill-treatment of failed asylum seekers upon return to Sri Lanka and is of the view that, in the present case, the State party's authorities gave appropriate consideration to the complainant's claims.

9.9 In the light of those considerations, read as a whole, the Committee concludes that the complainant and his family have not adduced sufficient evidence for it to conclude that they run a real, foreseeable, personal and present risk of being subjected to torture upon return to Sri Lanka. Furthermore, the complainant has not demonstrated that the State party's authorities failed to conduct a proper investigation into the submitted allegations. The Committee thus considers that the material on the file does not enable it to conclude that the return of the complainant and his family would constitute a violation of article 3 of the Convention.

10. Consequently, the Committee, acting under article 22 (7) of the Convention, concludes that the complainant and his family's removal to Sri Lanka by the State party would not constitute a breach of article 3 of the Convention.

(BHRC) and The International Truth and Justice Project, Sri Lanka, *An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014*, March 2014, available at www.barhumanrights.org.uk/wp-content/uploads/2014/03/an_unfinihsed_war_torture_and_sexual_violence_in_sri_lanka_2009-2014_0-compressed.pdf.

[27] See communication No. 628/2014, *J.N. v. Denmark*, decision adopted on 13 May 2016, para. 7.9.

[28] See, for example, communication No. 426/2010, *R.D. v. Switzerland*, decision adopted on 8 November 2013, para. 9.2.

[29] See, for example, communications No. 61/1996, *X, Y and Z v. Sweden*, decision adopted on 6 May 1998, para. 11.2; No. 435/2010, *G.B.M. v. Sweden*, decision adopted on 14 November 2012, para. 7.7; and No. 458/2011, *X. v. Denmark*, decision adopted on 28 November 2014, para. 9.5.